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Supreme Court, U.S.
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No. 93-1050

In the

Supreme Court of the United States

October Term, 1993

E.F. ETIE SHEET METAL COMPANY,

v.

SHEET METAL WORKERS LOCAL UNION NO. 54, AFL-CIO; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; HOUSTON SHEET METAL CONTRACTORS' ASSOCIATION; SHEET METAL AND AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION, INC.; and NATIONAL JOINT ADJUSTMENT BOARD.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT CASE NO. 92-2209

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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January, 1994

QUESTION PRESENTED FOR REVIEW

Whether utilization of an impasse resolution procedure of a collective bargaining agreement lawful under labor laws may constitute a conspiracy forbidden by the anti-trust laws. The issue in the context of this case is as follows: Where a union invokes an interest arbitration clause of an expiring labor agreement to obtain a new labor agreement with the employer party thereto, do that union, the arbitration panel and the parties appointing the arbitration panel face anti-trust liability if the employer subject of the award contends that the award is damaging to its competitive position.[1] Although Etie's petition also raises issues of the application of Texas common law it will be demonstrated that these are purely evidentiary issues and therefore may not be raised on a petition for a writ of certiorari. Finally, it appears from Paragraphs B, 2, 3, 4 and 8 of Etie's statement that it seeks review of the question of whether the unions' conduct herein constituted unfair labor practices under the NLRA, which likewise raises evidentiary issues.

[1] Petitioner Etie in its presentation of the questions for review sets forth eight numbered paragraphs and two lettered subparagraphs. It is respectfully submitted that Etie has thereby presented inappropriate argument and repetition and that all issues raised thereby are fairly included within the statement presented above.

A LIST OF ALL PARTIES

Under Rule 14.1(b) it is sufficient to note that the caption of the case in this matter contains the names of all parties. This Brief in Opposition is submitted jointly in behalf of all Respondents listed therein. Etie, in its list of parties, inappropriately and inaccurately purports to characterize the relationships between the various parties, and makes references to their alleged conduct herein. It is respectfully submitted that to the extent Etie's statement goes beyond merely identifying the parties, it should be disregarded.

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A STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

While Respondents do not dispute the statutory references by Petitioner Etie, Etie has seen fit to couch those references in an inappropriate argumentative context. Thus, while purporting to state the jurisdictional grounds of this Court, Etie makes gratuitous, pejorative and unsupported assertions regarding the conduct of the parties in this case. Because of this material non-compliance with this Court's rules, Respondent urges that to the extent Etie's statement goes beyond showing the grounds on which the jurisdiction of this Court is invoked, that it be disregarded.

COUNTER-STATEMENT OF THE CASE

Petitioner, E.F. Etie Sheet Metal Company, was at all times material a sheet metal contractor engaged in the construction industry in the Houston, Texas metropolitan area. In 1974, it joined the Houston Sheet Metal Contractors Association (hereinafter HSMCA), a multi-employer bargaining group, and authorized it to be Etie's exclusive bargaining agent with Sheet Metal Workers International Association Local 54 (hereinafter Local 54). HSMCA negotiated a labor agreement in behalf of Etie and others with Local 54 for 1982 through 1985. By mutual consent of HSMCA and Local 54, this agreement was extended to March 31, 1986, in exchange for a reduction in wages and changes in the required composition of the workforce. In August of 1984, HSMCA sought further wage reductions from Local 54 resulting in an agreement between them for an "interest arbitration" provision with respect to renewal labor agreements to replace the existing agreement. This interest arbitration, sometimes referred to in the record as Article X, Section 8, incorporated as the arbitration panel the National

Joint Adjustment Board (NJAB), which is an unincorporated body consisting of equal numbers of members appointed respectively by a labor group, the Sheet Metal Workers International Association (SMWIA), and an employer group, the Sheet Metal and Air Conditioning Contractors National Association (SMACNA). At the time of all of these agreements, HSMCA was the duly authorized representative of Etie and other sheet metal contractors members of the multi-employer bargaining group.

On April 11, 1985, Etie terminated its membership in HSMCA and notified the local union that it would negotiate for a replacement agreement on an individual employer basis. Etie complied with the existing agreement through its expiration date of March 31, 1986. Etie and Local 54 negotiated directly for a renewal agreement from March through May of 1986, but were unsuccessful. Thereafter, Local 54 submitted the contractual dispute pursuant to Article X, Section 8 to the NJAB. The NJAB met on June 24, 1986, and although Etie was given notice and an opportunity to attend, it elected not to attend. On June 27, the NJAB issued a unanimous decision ordering Etie to execute an agreement on the same terms as the contract between Local 54 and HSMCA, except that the new contract would not contain the interest arbitration provision. Etie refused to abide by this decision, and on July 2, 1986, began operating a new non-union shop.

This action was commenced by Local 54 to enforce the NJAB decision and for breach of contract. Etie's second amended counterclaim alleged that Local 54, HSMCA, SMACNA, SMWIA and the NJAB all violated the Sherman Anti-Trust Act by conspiring to fix prices and drive Etie out of business. There were various other claims of violation of state law and the National Labor Relations Act, which Etie purports to raise in its petition herein which it will be demonstrated, infra, are inappropriate for consideration under this court's

rules. All counter defendants moved for summary judgment or dismissal of the anti-trust counterclaims. Etie likewise moved for summary judgment on the anti-trust counterclaims asserting that there were no factual issues for trial. The District Court granted counter defendants' motions for summary judgment and dismissal of the anti-trust claims, and the United States Court of Appeals for the Fifth Circuit affirmed.

SUMMARY OF THE ARGUMENT

I. An "Interest Arbitration" Provision Of A Collective Bargaining Agreement Whereby The Parties Agree To A Binding Mechanism For A Replacement Agreement Is A Restraint On The Labor Market, And Accordingly, It Enjoys The Non-Statutory Exemption From The Anti-Trust Laws.

II. The Restraints Complained Of By Etie Flowed From The Operation Of Its Own Lawful Labor Agreement Bereft Of Any Taint Of Conspiracy.

III. Etie's Unfair Labor Practice Claims Raise Issues Relating To The Weight To Be Given Evidence Not Reviewable Herein.

IV. Etie's Petition For Certiorari Regarding Its Texas Common Law Claims Do Not Meet The Criteria Set Forth In Rule 10, In That Etie Merely Seeks This Court's Review Of The Lower Courts' Fact-Finding And Application Of State Common Law To Those Facts.

ARGUMENT

I. An Interest Arbitration Agreement And The Award Issued Pursuant Thereto Restrain Only The Labor Market And Therefore Qualify For The Non-Statutory Exemption To The Anti-Trust Laws.

The United States Supreme Court, through a series of cases, has recognized and balanced the conflicting aims of two important federal policies -- the fostering of business

competition under the anti-trust laws and the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. In Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), the first case in which the Supreme Court attempted to harmonize these two policies, the Court ruled:

> [A]n elimination of price competition based on differences in labor standards is the objective of any national labor organization, but this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. (Emphasis added.)

Id. at 503-504.

The Court went on to say that the Sherman Act was aimed at restraints upon commercial competition rather than wage competition. Id. at 503.

In accommodating the two conflicting congressional policies, the Court has recognized a non-statutory exemption from anti-trust liability. Meat Cutters Local 189 v. Jewel Tea Co., 381 U.S. 676 (1965); Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975). In Connell the Court stated:

> The non-statutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goal of federal labor law never could be achieved if this affect on business competition were held a violation of the anti-trust laws.

Id. at 622.

The restraints complained of by Etie herein stem from the enforcement of an "interest arbitration clause" of a labor agreement whereby the parties to that agreement agreed to final and binding arbitration to resolve disputes over negotiations for a renewal or replacement agreement. As shown below, interest arbitration is well within the traditional objectives of organized labor and accords with national labor policy so as to qualify for the non-statutory exemption.

An "interest arbitration clause" has been held by the National Labor Relations Board to be a lawful, valid provision of a labor agreement. Columbus Printing Pressmen, 219 NLRB 268, 89 LRRM 2553 (1975), enforced 543 F.2d 1161 (5th Cir. 1976). Interest arbitration, while not unlawful, is not a mandatory subject of bargaining and, accordingly, may not renew itself in perpetuity. However, several Circuit Courts have held that an interest arbitration is enforceable with respect to at least one renewal agreement. Sheet Metal Workers' Local 57 Welfare Fund, et al. v. Tampa Sheet Metal Company, Inc., 786 F.2d 149, 122 LRRM 2161 (llth Cir. 1986); Sheet Metal Workers' International Association Local Union No. 420 v. Huggins Sheet Metal, Inc., 752 F.2d 1473 (9th Cir. 1985); Sheet Metal Workers' International Association Local 14 v. Aldrich Air Conditioning, Inc., 717 F.2d 456, 114 LRRM 2657 (8th Cir. 1983); NLRB v. Columbus Printing Pressmen & Assistants' Union No. 252, 453 F.2d 1161, 93 LRRM 3055 (5th Cir. 1976); Winston-Salem Printing Pressmen & Assistants v. Piedmont Publishing Co., 393 F.2d 221, 67 LRRM 2939 (4th Cir. 1968). While the Fifth Circuit decision in Columbus Printing Pressmen, supra, found unlawful an attempt to utilize an interest arbitration clause to perpetuate itself, the Court commented generally about such clauses:

> Promotion of such procedures for the peaceful settlement of disputes is unquestionably an important purpose of the Act.

543 F.2d at 1170.

Two Courts of Appeals, the Ninth and the Eleventh, have held that the specific interest arbitration provisions of Article X, Section 8 in the sheet metal industry are valid and enforceable in Court as an interest arbitration. Sheet Metal Workers' Local 57 Welfare Fund v. Tampa Sheet Metal Company, Inc., supra; Sheet Metal Workers' International Association Local Union No. 420 v. Huggins Sheet Metal, Inc., supra. These authorities show that interest arbitration is a lawful aspect of collective bargaining which Congress has seen fit to foster and protect. As such, it is not the type of conduct reached by the anti-trust laws.

Succinctly stated, Etie's Complaint in its entirety stems from the enforcement of an interest arbitration clause contained in a labor agreement entered on Etie's behalf by its own duly authorized bargaining representative. As found by the Court of Appeals, that arbitration clause was invoked pursuant to a substantial disagreement over a variety of mandatory as well as permissive subjects of bargaining. (1 F.3rd at 1473-4) Etie, in its argument to this Court, makes much of the fact that interest arbitration as well as certain clauses awarded thereby are permissive rather than mandatory subjects of bargaining.[2] The Court of Appeals in disposing of that argument noted that the applicable principle was "that unions should focus on the labor market rather than employer's

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[2] Etie's repeated characterization of certain contract clauses as being "illegal" (e.g., Petition, Pages 3, 4, 6, 7 and 8) demonstrates the carelessness with which Etie makes its allegations. Although some of the contract clauses were found to be permissive, neither the District Court nor the Court of Appeals found any of the contract clauses which were awarded to be illegal. There is nothing in the record to the contrary.

product markets." With regard to the non-mandatory nature of interest arbitration, the Court added:

> A non-mandatory procedural device can be used to facilitate substantive agreement about wages or working conditions without offending that principle.

(1 F.3rd at 1475)[3] Moreover, to the extent that the interest arbitration panel awarded non mandatory contract clauses the Court of Appeals ruled that it was sufficient relief to deny enforcement as to those clauses. (1 F.3rd at 1477) It is submitted that this is a complete answer to Etie's argument. The mere presence of non-mandatory clauses in the contract would not "render the entire contract void unless the 'forbidden provision is so basic to the whole scheme of the contract and so interwoven with all its terms that it must stand or fall as an entity.' 345 US at 78 [quoting from NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953)]." Local 92, Chattanooga Mailers Union v. Chattanooga Free Press Co., 524 F.2d 1305, 1313 (6th Cir. 1975), Accord: Jackson Purchase Rural Electric Ass'n. v. Local 816, IBEW, 646 F.2d 264, 268 (6th Cir. 1981); Zechman v. Merrill Lynch, 742 F.Supp. 1359, 1364 (N.D. Ill. 1990). In summary, therefore, to the extent non-mandatory (permissive) contract provisions were a part of the interest arbitration award, they were peripheral to the issues of this case, and had no bearing on the restraint complained of.

In both Jewel Tea and Connell, the Court found direct restraints on commercial competition or "the business market."

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[3] Etie's assertions from time to time in its brief that the National Joint Adjustment Board is "controlled" by the National Parties are without record support. It is axiomatic that "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." AT&T Tech., Inc. v. Communications Workers of America, 475 U.S. 643, 648-9 (1986).

See also, Mid-America Regional Bargaining Association v. Will County Carpenters District Council, 675 F.2d 881 (7th Cir. 1982), cert. denied 459 U.S. 860 (1982) and Consolidated Express, Inc. v. New York Shipping Association, 602 F.2d 494 (3d Cir. 1929), vacated and remanded on other grounds, 448 U.S. 901 (1980), on remand, Consolidated Express, Inc. v. New York Shipping Association, 641 F.2d 90 (3d Cir. 1981), prohibition denied, In Re: International Longshoremen's Assoc., 451 U.S. 905 (1981). In Jewel Tea, the direct restraint pertained to the restriction of hours for the sale of the meat at grocery stores. However, the Court there found that the restraint was so "intimately related" to wages, hours and working conditions, that it was protected by the national labor policy and was, therefore, exempt from anti-trust liability. Supra at 690. In Connell, a general contractor had agreed with the local union to subcontract only with employers who had agreements with the local. Connell had no employees represented by the local and the local had no interest in representing any employees of Connell. The Court found that by virtue of these agreements the local had complete control over access to the market and that this control could result in significant adverse effects on the market and on consumers, "effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions." Supra at 625. Significant for the Court in Connell was the absence of a collective bargaining agreement between the general contractor and the local.

In contrast,the present case involves restraints solely upon the labor market. Indeed, Etie's complaint throughout has been that the union wage scale imposed upon it prevented it from competing with lower-wage non-union competitors. Thus, on the face of the Complaint, it is not necessary to determine, as in Jewel Tea, whether the restraints are "intimately related" to wages, hours, and working conditions. The Complaint shows on its face that the restraints, contrary to being on the business

market, fall squarely within the non-statutory labor exemption. Since the restraints arose in the course of a lawful collective bargaining relationship, the Connell decision is inapplicable.

A case similar to the present situation upholding the dismissal under Rule 12 of an anti-trust Complaint is Mid-America Regional Bargaining Association v. Will County Carpenters District Council, 675 F.2d 881 (7th Cir. 1982) cert. denied, 459 U.S. 860. In that case, the union and three employer associations were unable to agree upon a contract. The associations called for all of their members to lock out their union-represented employees. A public utility which was having a nuclear plant constructed entered an agreement with the union in order to prevent a work stoppage, whereby the contractors working on the public utility project would pay into escrow a certain amount per hour to be paid to the employees on the project when the employer associations settled with the union. The utility agreed to reimburse the contractors for this expense. The associations sued claiming that the agreement had the effect of imposing a wage scale that would restrain their right to bargain with the union and which would injure other contractors. The Court stated: "The complaint alleges no more than an agreement to restrain the labor market. As such, it is exempt from antitrust scrutiny." Id. at 893.

II. The Conspiracy Asserted By Etie Is The Operation Of Its Own Lawful Labor Agreement Bereft Of Any Taint Of A Conspiracy, And As Such, It Does Not Come Within The Pennington Model.

In UMW v. Pennington, 381 U.S. 657 (1965), the Court once again distinguished between the elimination of wage competition and commercial competition in the market.

> It is true that wages lie at the very heart of those subjects about which employers and unions must bargain and the law contemplates agreements on wages not only between individual employers and the union but agreements between the union and employers in a multi-employer bargaining unit. (Citations omitted.) The union benefit from the wage scale agreed upon is direct and concrete and the effect on the product market, though clearly present, results from the elimination of competition based on wages among the employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe. (Citations omitted.) We think it beyond question that a union may conclude a wage agreement for the multi-employer bargaining unit without violating the antitrust laws . . .

Id. at 664.

In that case, major coal companies agreed to increase wages and benefits for union members in return for the union's promise not to oppose the mechanization of the industry. The union also agreed that they would demand the same wages from the smaller companies regardless of whether the small companies could afford to mechanize.

Even though the agreement between the employers and union concerned wages, the Court held that the union lost its exemption since it had agreed with "one set of employers to impose a certain wage scale on other bargaining units." Id. at 665. The Court felt that this agreement was contrary to the national labor policy since the union could not serve its obligation to its members to bargain on a unit-by-unit basis.

A review of Counter-Plaintiff's Complaint shows that as a matter of law its theory does not fit this model. The conspiracy in Pennington was not in the negotiation and implementation of the labor agreement but was rather a

separate conspiracy among the parties to utilize the labor agreement as a tool in its implementation. This type of theory has been described as requiring the existence of a "predatory" conspiracy. In Embry-Riddle University v. Ross Aviation, 504 F.2d 896, 903 (5th Cir. 1974) the Court stated:

> At least in cases falling within the Pennington model for nonexemption and liability to be found, the union must be proved to have had a purpose to injure or eliminate the competitor of a company whose employees it represents.[4]

The Court, however, went on to caution that neither the pursuit of uniform conditions by the union nor the harboring of anti-competitive purposes were the gravamen of the offense. Thus, the Court stated:

> A union can, without forfeiting the exemption or substantially transgressing the antitrust laws, act with a purpose to injure or even eliminate the business of an employer no matter whether it does so because it more or less legitimately defines its interest in terms of injuring the employer or because of personal animus toward a particular employer . . .

504 F.2d at 903.

A part of the Court's reasoning in Pennington was that by entering the conspiracy the union "straight-jacketed" itself in serving the interests of its members. 381 U.S. at 666. Accordingly, the Court found that there was no national labor

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[4] The rationale requiring predatory intent stems from a concurring opinion to Pennington specifically requiring the same (381 U.S. at 672-3) combined with the three dissenting justices urging a broader exemption from the anti-trust laws.

policy in support of such an agreement. The rationale does not apply here. By resorting to interest arbitration, the union has not compromised its own self interest with respect to proposals or such advocacy as it would make before the arbitration panel. Indeed, in a larger sense, when a union goes on strike for a contract, it invokes economic forces that are to some degree beyond its control. It is submitted that the right to strike, as well as the right to resort to interest arbitration, are consistent with national labor policy, and accordingly, both qualify for the non-statutory exemption.

Etie does not complain of a conspiracy independent of the labor agreement. Rather, Etie complains of the operation of its labor agreement itself.[5] The Court of Appeals in disposing of this argument stated persuasively and concisely as follows:

> No evidence suggests that a conspiracy infected any other stage of Etie's dealings with Local 54. Local 54's unilateral invocation of a legal remedy was within its rights. (Citation omitted.) And nothing suggests that a conspiracy orchestrated the NJAB's award. Etie can only point to statements by national union officials that show their awareness of the need to cut wages. These statements at best show that the clause was negotiated as part of an agreement about wages.

(1 F.3rd at 1475)

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[5] While Etie's complaint broadly construed could be said to allege in general terms a conspiracy, it is clear from the briefs and all proceedings herein that Etie's claims pertain solely to the operation of its labor agreement. It should be noted in that regard that Etie, like the counter defendants, urged to the Court that there were no factual issues for trial in this case, and that it was entitled to summary judgment as a matter of law.

III. Etie's Unfair Labor Practice Claims Raise Issues Of The Weight To Be Given Evidence Not Reviewable On Certiorari.

Etie's second amended counterclaim alleged that counter defendants "forced and restrained . . . Etie to join and maintain membership in HSMCA" in violation of 29 U.S.C. Section 158(b)(4)(A). Although it is not entirely clear, Etie's petition herein appears to seek review on that issue. It is respectfully submitted that in so doing, Etie presents issues relating to the weight to be given evidence which are not reviewable herein. The Court of Appeals found as a matter of fact that HSMCA was Etie's duly authorized representative when it entered the interest arbitration agreement. The Court also found that interest arbitration was invoked and a new contract awarded pursuant thereto to a substantial extent because disagreement over mandatory bargaining issues. (1 F.3rd at 1473-4) Accordingly, the weight of the evidence was against Etie's contention. In this context, Etie's Petition must be regarded as a challenge to factual determinations, and as such, inappropriate for review on Certiorari. In any event, it is well settled that the District Court was preempted from consideration of these claims. Building Trades Council v. Garmon, 359 US 236 (1957).

IV. Etie's Petition Does Not Raise Any Issue Under Texas Common Law Which Merits Consideration By This Court.

Etie asks this Court to review the application of Texas common law theories (fraud, breach of fiduciary duty, and breach of contract) to the particular facts of this case. Indeed, the pivotal facts upon which Etie relies involve a specific, written delegation of bargaining authority by Etie to HSMCA, a member of SMACNA. Based on this delegation, Etie

contends that HSMCA's agreement with Local 54 to include an interest arbitration clause (Article X, § 8) in their labor contract, without Etie's express consent, was an unlawful delegation of agency authority to the NJAB, subjecting HSMCA and SMACNA to liability under the common law of Texas.

Etie's Petition for Writ on this issue does not meet the criteria set forth in Rule 10 of the Supreme Court's rules governing review of writ of certiorari. The Fifth Circuit's decision does not conflict with the decision of another United States court of appeals, does not conflict with a state court of last resort with respect to a federal question, and does not depart from the accepted or usual course of judicial procedure. Sup. Ct. R. 10.1(a)[6] Etie points to no decision of a federal appellate court or state court of last resort that is in conflict with the Fifth Circuit's decision on this issue. Etie does not even contend that such a decision exists. Etie merely cites a 60-year old Texas appellate court decision and Tex. Jur. 3d Agency, regarding the delegation of agency authority; and, in doing so, conveniently ignores the well-accepted principle that the authority to delegate agency authority may be implied from the nature and circumstances of the transaction. 3 Tex. Jur. 3d Agency § 36 at 64 (1980). See also, Powell v. State, 82 Tex. Crim. 163, 198 S.W. 317, 319 (1917); Eastland v. Maney, 36 Tex. Civ. App. 147, 81 S.W. 574, 575 (1904, no writ).

Nor does Etie assert that the decisions of the district court or the court of appeals have "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1(a). Rather, Etie merely voices its disagreement with

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[6] Rule 10.1(b) and (c) are inapplicable to this issue as they involve a decision by a state court of last resort or a United States court of appeals regarding questions of federal law. As discussed above, the instant issue involves questions of Texas common law.

the district court's and Fifth Circuit's application of state law agency principles to the specific facts of this case as grounds for its petition. Under the Supreme Court's rules, this is not enough.

The district court made a fact-finding that the HSMCA acted within the authority of its contract with Etie, and the Fifth Circuit concurred. 1 F.3d at 1469. While the Fifth Circuit disagreed with the district court that the other state law claims (fraud and breach of fiduciary duty) were barred by limitations or pre-empted under federal labor law, it nevertheless concluded that "since no evidence in the record shows that HSMCA abused its authorized power, this finding [that HSMCA did not breach its contract with Etie] also disposes of the breach of fiduciary duty and fraud claims." 1 F.3d at 1471. Under well-accepted principles of Supreme Court practice and procedure, a petition challenging findings of fact does not raise issues worthy of the Supreme Court's attention. As stated by Justice Holmes, "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925).

In any event, the lower courts' decisions on the merits are correct. Applying the Texas common law principle that agents have implied authority to do all things proper, usual or necessary to exercise that authority, the Fifth Circuit concluded that the district court correctly held that Etie implicitly authorized HSMCA to agree to Article X, § 8. 1 F.3d at 1471. Accordingly, the Fifth Circuit's findings that Etie implicitly authorized HSMCA to agree to Article X, § 8, and that HSMCA did not breach its contract or abuse its authority, are not in error.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

Robert J. Fenlon
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